Supreme Court, U.S.
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IN THE SUPREME
COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CASE NO.:

JAMES T. WILSON and ELAINE WILSON,

Petitioners,

VS.

ALEXANDER'S POWER SHIPPING CO., LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
AND
APPENDIX TO PETITION

Alan S. Gaynor
BOUHAN, WILLIAMS & LEVY
P.O. Box 2139
Savannah, GA 31498
(912) 236-2491
Counsel for Petitioners

96pp

QUESTIONS TO BE PRESENTED FOR REVIEW

1. Inasmuch as the Legislative intent to the 1972 Longshore and Harbor Workers' Compensation Act (LHWCA) Amendments was to provide stevedores, like Petitioner Wilson, with a §905(b) action for injuries sustained by falls on undetectable oil created by the vessel owner prior to turnover and where this Court has confirmed the legislative intent in Scindia Steam Navigation Co. Ltd. v. DeLos Santos, 451 U.S. 156 (1981) and in Howlett V. Birkdale Shipping Co., 512 U.S. _____, 114 S.Ct. 2057, 129 L.Ed 2d 78 (6/13/94) did the Eleventh Circuit's decision, by removing both of the two independent Scindia turnover duties from the jury, conflict with this Court and with other circuits.

2. By holding that Respondent vessel owner had no responsibility under either independent Scindia turnover duty, for its creation of undetectable oil prior to turnover, whether the Eleventh circuit has effectively created an impermissible assumption of the risk doctrine in §905(b) LHWCA cases.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS -APPENDIX v

TABLE OF AUTHORITIES vii

OPINIONS 2

JURISDICTION 2

BASIS FOR FEDERAL JURISDICTION 3

STATUTES INVOLVED 3

LEGISLATIVE HISTORY 4

STATEMENT OF THE CASE 5

ARGUMENT 8

I. THE TRIAL COURT AND THE ELEVENTH CIRCUIT DECISIONS CONFLICT WITH THIS COURT'S §905(b) LHWCA DECISIONS, SCINDIA STEAM NAVIGATION CO. LTD. V. DELOS SANTOS, 451 U.S. 156 (1981) AND HOWLETT V. BIRKDALE SHIPPING CO., 512 U.S. at _____, 114

S.Ct. 2057, 129 L.Ed 2d
78 (6/13/94), AS WELL AS
WITH THE THIRD, FIFTH
AND NINTH CIRCUITS. THESE
DECISIONS, WHICH PRESERVE
THE CONGRESSIONAL INTENT
IN THE 1972 LHWCA AMEND-
MENTS DICTATE THAT A
TRIER OF FACT, NOT A
COURT, MUST RESOLVE
THE QUESTION OF WHETHER,
THE VESSEL OWNER BREACHED
ITS TWO INDEPENDENT
TURNOVER DUTIES BY CREATING
AN UNDETECTABLE DEFECT (OIL)
PRIOR TO TURNOVER IN THE
WORK AREA 8

A. THE INDEPENDENT DUTY
TO PROVIDE A REASONABLY
SAFE PLACE TO WORK
APPLIES IRRESPECTIVE
OF WHETHER THE DEFECT
IS OPEN OR LATENT 13

B. UNDER THIS COURT'S
DEFINITION, THE
UNDETECTABLE, TRANS-
PARENT OIL CREATED
BY THE RESPONDENT
OWNER CONSTITUTED
A LATENT DEFECT.
THUS, BECAUSE THE
OWNER FAILED TO

INSPECT THE AREA AND FAILED TO WARN PETITIONER WILSON IT HAS POTENTIAL LIABILITY UNDER THE SECOND INDEPENDENT SCINDIA DUTY 19

II. BY REFUSING TO RECOGNIZE THAT RESPONDENT VESSEL OWNER HAS POTENTIAL LIABILITY FOR CREATING AN UNDETECTABLE DEFECT PRIOR TO TURNOVER IN A COMMONLY USED WORK AREA (WEATHERDECK), THE ELEVENTH CIRCUIT AND THE TRIAL COURT HAVE EFFECTIVELY CREATED AN IMPERMISSIBLE ASSUMPTION OF THE RISK DOCTRINE IN THIS §905(B) LHWCA CASE 22

CONCLUSION 24

TABLE OF CONTENTS

APPENDIX

United States District Court, Southern District of Georgia, Savannah Division, Order dated November 15, 1993, ... 1a

United States District Court, Southern District of Georgia, Savannah Division Judgment in a Civil Case dated November 18, 1993 . . . . . 7a

The United States Court of Appeals for the Eleventh Circuit Order dated September 20, 1994 . . . . . 9a

The United States Court of Appeals for the Eleventh Circuit Order On Petition(s) for Rehearing and Suggestion(s) of Rehearing En Banc dated November 29, 1994 . . . . . 11a

United States District Court, Southern District of Georgia, Savannah Division, Order dated December 11, 1994 . . . . . 13a

Complaint 14a

Defendant's Motion for Summary Judgment dated 20a

Plaintiffs' Response to Defendant's Motion for Summary Judgment dated May 21, 1993 . . . . . 34a

Klages Deposition Excerpts 55a

Photographs 60a, 61a

TABLE OF AUTHORITIES

Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969) 13

Gay v. Barge, 266, 915 F.2d 1007 (5th Cir. 1990) 15

Howlett V. Birkdale Shipping Co., 512 U.S. _____, 114 S.Ct. 2057, 129 L.Ed 2d 78 (6/13/94) 1, 2, 5, 8, 12, 13, 14, 17, 18, 19, 20, 21, 22, 23

Kirsch v. Prekookeanska Plovidba, 971 F.2d 1026 (3rd Cir. 1992) 16, 23

Scindia Steam Navigation
Co. Ltd. v. DeLos Santos,
451 U.S. 156 (1981) . . . . . 1 ,
5, 7, 8,
9, 11, 12,
13, 14, 15,
19, 22, 23

Socony Oil co. v. Smith,
395 U.S. 424 (1939) 22

Thomas v. Newton
International Enterprises,
42 F.2d 3 1266 (9th Cir, 1994) 15,
16

Treadaway v Societe
Anonyme Louis-Dreyfus,
894 F.2d 161 (5th Cir. 1990) 15

1972 U.S. Code Cong.
& Admin. News, at 4704 41

IN THE SUPREME
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CASE NO.:

JAMES T. WILSON and ELAINE WILSON,

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VS.

ALEXANDER'S POWER SHIPPING CO., LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, James Wilson, respectfully prays that a Writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Eleventh Circuit entered

September 20, 1994, affirming the granting of Summary Judgment in favor of Respondent in the within proceeding, and the Order of the United States Court of Appeals for the Eleventh Circuit entered November 29, 1994, denying Petitioner's Petition for Rehearing or a Suggestion of En Banc Consideration, and in support thereof represents as follows:

OPINIONS

The Judgment of the United States Court of Appeals for the Eleventh Circuit affirming the decision of the United States District Court for the Southern District of Georgia is not officially reported and is reproduced in the Appendix hereto at Page 14a.

The Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's Petition for Rehearing or a Suggestion of En Banc Consideration is not officially reported and is reproduced in the Appendix hereto at page 16a.

The Opinion of the United States District Court for the Southern District of Georgia granting Summary Judgment against Petitioner is not officially reported and is reproduced in the Appendix hereto at Page 6a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 20, 1994. the Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's Petition for Rehearing or

a Suggestion of En Banc Consideration was entered November 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

BASIS FOR FEDERAL JURISDICTION

The District Court for the Southern District of Georgia, Savannah Division, had jurisdiction of this case pursuant to 28 U.S.C. §1332.

STATUTES INVOLVED

Section 5(b) of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §901, et seq.

> (b) In the event of injury to a person covered under this Chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if

> the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided by this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Chapter.

LEGISLATIVE HISTORY

The legislative history of the 1972 amendments to the Longshore and Harbor Workers' Compensation Act appears in House Report No. 72-1441, and is reprinted in 1972 U.S. Code Cong. & Adm. News, Vol 3, beginning at page 4698.

STATEMENT OF THE CASE

Petitioner, James Wilson, a Savannah stevedore foreman, was injured when he slipped on undetectable, transparent oil during a pre-turnover inspection of the M/V ALEXANDER'S POWER. Petitioner Wilson's employer, Allsouth Stevedoring Co. was scheduled to commence loading at 0800, April 17, 1991. The oil, which originated from the vessel's cranehouse, was not visible. The oil was located on the dew covered weatherdeck beneath a bundle of previously stowed lumber (33a, 39a)[1]. Without question, the oil had originated from the vessel's crane house, an instrumentality under the exclusive control of the Respondent ship owner (39a).

Inasmuch as the incident occurred before any of Allsouth's longshoremen boarded the vessel to commence work, it occurred prior to the time that the vessel owner turned the work area over to Allsouth. Thus, this case involved the two independent turnover duties enumerated in Scindia Steam Navigation Co. Ltd. v. DeLos Santos, 451 U.S. 156 (1981) and more recently discussed in Howlett v. Birkdale Shipping Co., 512 U.S. _____; 114 S.Ct. 2057, L.ed 2d (6/13/94).

Accompanied by one other Allsouth stevedore, Sam Hughes, and Allsouth's Safety Director, Donald Klages, Mr. Wilson, at approximately 0745, boarded the M/V ALEXANDER'S POWER to conduct a pre-turnover inspection of the vessel's holds and other spaces. At the time

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[1] Petitioner has reproduced excerpts from the record which was before the Eleventh Circuit and has included such excerpts in the Appendix.

of the incident, Petitioner Wilson was proceeding forward along the starboard weatherdeck. Because of the manner in which the vessel had previously stowed bundles of lumber on the starboard weatherdeck, Petitioner Wilson and his fellow workers were required to climb up and down from the bundles of lumber (which were approximately 4' high). The bundles stretched from the bulwarks (ship rail) to the hatches. Thus, there was no continuous access along the weatherdeck (41a, 47a). Photographs taken after the incident demonstrated the method of stow on the weatherdeck (57a, 58a).

To gain access to the #2 hold which he was to inspect, Petitioner Wilson had to climb onto a bundle of lumber. After walking forward on the bundle, he was required to climb down almost three feet to a pipeguard and then down to the deck (approximately 1'). At that time, before inspecting the hold, he intended to walk across the weatherdeck to the bulwark (Ship's rail). He was to discuss a point with an ILA member on the pier (47a). As he stepped down to the deck, he slipped on transparent oil which, as all eyewitnesses testified, was not visible, either before or after the incident(Wilson 48a)(Hughes 51a)(Klages, 42a). As a result of the fall Mr. Wilson sustained a herniated disc (L4-L5). He has been unable to return to work.

After Mr. Wilson fell, Allsouth's safety director, Donald Klages, inspected the area but still could not determine visually that there was any oil (Klages 43a). He then rubbed his hand on the spot and determined that it was slippery. Subsequently, one of the vessel's crew members and he traced the origin of the hidden oil to the vessel's adjacent crane house (adjacent to hold #2). This compartment housed hydraulic lines (43a). Previously, the vessel's crew had opened the hatch covers which operate hydraulically. During

that time, crew members were present on deck (46a).

In his complaint, Petitioner Wilson alleged that Respondent vessel owner breached both of the two Scindia independent turnover duties. Petitioner's allegations were as follows:

a. At the time in which Plaintiff and his co-workers boarded the M/V ALEXANDER'S POWER, oil was present on the deck of the vessel. Therefore, Defendant was negligent in failing to turn over the vessel to Plaintiff is a reasonably safe condition.

b. Defendant was negligent in failing to maintain its crane in a proper working condition and, thus, was negligent in permitting oil to leak out onto the deck.

c. Defendant was negligent in failing to warn Plaintiff of a hidden danger, i.e., existence of clear oil on the deck (1a).

Respondent vessel owner filed a Motion for Summary Judgment. In support thereof, Respondent relied on a Statement of Material Facts to Which There Exists no Genuine Issue to be Tried and Petitioner's Answers and affidavits from witnesses who did not observe the incident. Petitioner, in addition to a responsive pleading, submitted affidavits of Petitioner Wilson, his fellow stevedore, Sam Hughes, Allsouth's Safety Director, Don Klages and Mr. Klages' deposition excerpts.

Based principally on the fact that Petitioner Wilson, like any candid stevedore or longshoreman, admitted that oil was common on vessels and that, like any diligent stevedore,

he was checking for its existence, the trial court granted Respondent shipowner's Motion for Summary Judgment (6a). However, in its opinion, the lower Court referred only to Respondent's Statement of Material Facts as to Which There Exists no Genuine Issue to be Tried. Contrary to a statement in the opinion, Petitioner in response to the Motion, had denied that he expected to find oil during the pre-turnover inspection(33a). Undeniably, he was not warned of this defect which neither of his two co-workers nor he could detect.

Significantly, in its very brief opinion, the trial court addressed only the second independent Scindia duty - duty to warn of hidden dangers. Thus, the lower court did not address the 1st independent Scindia turnover duty - duty to provide a reasonably safe place to work (6a).

On appeal, Petitioner Wilson emphasized that the lower court had addressed only the second duty. In this respect, at oral argument and in letter brief, Petitioner referred the Eleventh Circuit to this Court's opinion in Howlett which had been decided after briefs were submitted. Nonetheless, the Eleventh Circuit, without discussing the fact that the two Scindia turnover duties were independent or without addressing the first Scindia duty, affirmed the lower court in a per curiam opinion.

ARGUMENT

I. THE TRIAL COURT AND THE ELEVENTH CIRCUIT DECISIONS CONFLICT WITH THIS COURT'S §905(b) LHWCA DECISIONS, SCINDIA STEAM NAVIGATION CO. LTD. V. DELOS SANTOS, 451 U.S. 156 (1981) AND HOWLETT V.

BIRKDALE SHIPPING CO., 512 U.S. at _____, 114 S.Ct. 2057, 129 L.Ed 2d 78 (6/13/94), AS WELL AS WITH THE THIRD, FIFTH AND NINTH CIRCUITS THESE DECISIONS, WHICH PRESERVE THE CONGRESSIONAL INTENT IN THE 1972 LHWCA AMENDMENTS DICTATE THAT A TRIER OF FACT, NOT A COURT, MUST RESOLVE THE QUESTION OF WHETHER, THE VESSEL OWNER BREACHED ITS TWO INDEPENDENT TURNOVER DUTIES BY CREATING AN UNDETECTABLE DEFECT (OIL) PRIOR TO TURNOVER IN THE WORK AREA

The effect of the Eleventh Circuit's decision is to eliminate a stevedore's §905(b) LHWCA remedy for undetectable, hazardous conditions created by a vessel prior to turnover. In this respect, the decision ignores the fact the two turnover duties set forth in **Scindia Steam Navigation Co. Ltd. v. DeLos Santos, 451 U.S. 156 (1981)** are independent.

In **Scindia Steam Navigation Co. Ltd. v. DeLos Santos, 451 U.S. 156 (1981)** this Court, enumerated two independent turnover duties that the vessel owner, in a §905(b) LHWCA case, owed to a stevedore. First, prior to turning the work area over to the stevedoring company for loading or discharge, the vessel owner has an obligation to provide a reasonably safe work place for a competent stevedore, i.e., a weatherdeck free of undetectable defects. The second independent, turnover obligation is that the vessel owner must warn of hidden dangers, e.g., undetectable oil.

As Congress indicated in the Committee Reports to the 1972 LHWCA Amendments, oil is a hazard for which a vessel owner has potential liability. As the Report stated:

> Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take corrective action where it knows or should have known about a dangerous condition.
>
> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently railed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

1972 U.S. Code Cong. & Admin. News, at 4704.

In Scindia this Court framed the two independent duties in the following manner:

> That the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances." This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such a condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. Id., at 416, n 18, 22

> L.Ed. 371, 89 S. Ct. 1144. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at lest to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.

Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156, at 167 (1981). Until the Eleventh Circuit, in summary fashion, affirmed the trial court, no Circuit court in a LHWCA §905(b) turnover case, had ever ruled that a vessel owner had no obligation for undetectable dangers that it had created in instrumentalities within its exclusive control, e.g., oil originating from the crane house and leaking on to the weatherdeck. Scindia and Howlett, disregarded by the Eleventh Circuit, indicate that the trier of fact must resolve the questions - whether the vessel owner has breached these two independent duties.

A. THE INDEPENDENT DUTY TO PROVIDE A REASONABLY SAFE PLACE TO WORK APPLIES IRRESPECTIVE OF WHETHER THE DEFECT IS OPEN OR LATENT

Petitioner Wilson alleged that the transparent oil constituted a pre-turnover latent defect. The evidence was undisputed that his colleagues and he could not see the oil on the dew covered deck. Moreover, Petitioner Wilson did not expect to find oil (33a, 36a). In any event, irrespective of whether the defect was hidden or open, the trier of fact, not the court, must resolve the issue of whether Respondent vessel owner breached its first Scindia turnover duty - whether having created a hazard on the weatherdeck, the owner fulfilled its obligation to turn over the work area in a reasonably safe condition. Thus, the Eleventh Circuit's opinion conflicts not only with this Court's decision but with every other Circuit which has considered these issues.

As framed by this Court in Scindia, the owner's duty to turnover its vessel in a reasonably safe condition is not dependent on the existence of a latent defect (as defined in Scindia and Howlett). Rather, only the second obligation, duty to warn, is dependent on the existence of a latent defect.

In Howlett, this Court referred to its previous decision in Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969), a pre-1972 LHWCA case. Noting that the vessel had a duty to turn over the vessel in a reasonably safe condition, this Court in Howlett stated that, as a

corollary, the owner must warn of hidden defects. However, this court further stated, as it had in Scindia, that there are two components to the turnover duty. Howlett, 512 U.S. at ____, 114 S.Ct. 2057, 129 L.Ed 2d 78 (1994).

In Howlett, unlike Petitioner Wilson, the plaintiff for some inexplicable reason, had not alleged that the owner had breached the first independent duty. In this respect the Court noted:

> "[a]lthough both components of the turnover duty are related in various respects, Howlett confines his case to an allegation that Birkdale failed to warn that the tween deck was covered with plastic rather than (as is ordinarily the case) than paper and plywood."

512 U.S. at ____; 114 S.Ct. 2057, 129 L.Ed 2d 78 at 87.

In that case, a discharging longshoreman slipped on a sheet of clear plastic in previously stowed cargo. Although this Court observed that one of Plaintiff's witnesses was able to see the plastic, it held that there was an issue of fact on the second independent duty - to warn of latent defects. In any event, Howlett is significant to this case because it has re-emphasized that the two turnover duties are independent.

In every other circuit except now, in the Eleventh Circuit, courts have held that the first turnover duty applies irrespective of whether the defect is open or latent. Thus, where there was sufficient evidence that the owner created a

defect in its structure or in its appurtenances, the trier of fact, not the court, must decide the two Scindia duties. Otherwise, a stevedore would assume the risk of vessel created pre-turnover defects.

In Gay v. Barge, 266, 915 F.2d 1007 (5th Cir. 1990), Plaintiff longshoreman, while boarding the vessel, slipped on a makeshift gangway. The condition, created by the vessel, was obvious. Accordingly, Plaintiff alleged that the owner was negligent in failing to turn over the vessel in a reasonably safe condition. The Fifth Circuit held that there was sufficient evidence to withstand a Motion for Directed Verdict. In Gay, there was evidence that the vessel owner had actual knowledge of the conditions. However, as this Court stated in Scindia, the vessel owner was charged with knowledge of pre-turnover conditions in areas created under its exclusive control. 451 U.S. at 176.

In Treadaway v Societe Anonyme Louis-Dreyfus, 894 F.2d 161 (5th Cir. 1990), Judge Wisdom held that a longshoreman's awareness of an open hazard did not preclude recovery (detectible oil on the main deck on which Plaintiff traversed towards his work area. The Fifth Circuit, based on this court's opinion in Scindia, affirmed the jury's verdict in favor of the Plaintiff.

Most recently, the Ninth Circuit in Thomas v. Newton International Enterprises, 42 F.2d 3 1266 (9th Cir, 1994) re-emphasized the nature of the vessel's duty for open and obvious conditions in the vessel's appurtenances. Plaintiff Thomas, a longshoreman, fell through an unguarded hatch opening while proceeding into hold #6 during cargo operations. As in the instant case. Plaintiff Thomas was preceded by a co-employee. Both workers had looked down

the ladder. Moreover, like Petitioner Wilson, Plaintiff Thomas was not aware of the danger beneath her and, thus, was not aware of any conscious decision that she could possibly make. However, unlike Plaintiff Thomas, Petitioner Wilson could not detect the defect - transparent oil on the dew covered deck. In any event, the court in Thomas considered the conditions to be open and obvious.

Reversing the lower court's order granting summary judgment to the vessel owner, the Ninth Circuit held that failure to eliminate an unreasonably dangerous condition may constitute a failure to turn over the vessel in a condition reasonably safe for an experienced stevedore to work. As the court stated:

> In determining whether a particular hazard is unreasonably dangerous, the fact finder must examine the totality of the factual circumstances surrounding the hazard and the accident and consider them as a whole.

42 F.3d at 1270.

The court further held that, contrary to the vessel's position, avoidability of the hazard, although relevant, was not necessarily determinative.

Although finding for the vessel owner, the Third Circuit in Kirsch v. Prekookeanska Plovidba, 971 F.2d 1026 (3rd Cir. 1992), stated that vessel owners cannot always rely on longshore workers to avoid even the most obvious of

hazards. Moreover, the court in language very appropriate to the instant case, stated as follows:

> Where a longshore worker slips and falls on an oil spill that was not obvious to the worker in the performance of his or her duties is the paradigmatic case where an action lies against the shipowner for negligence. In many cases, the obviousness of a hazard will be a reasonably disputed issue of fact in appropriate for resolution by the district Court on summary judgment.

971 F.2d at 1030, fn. 5.

In the instant case, the undisputed evidence by eyewitnesses was that the oil was not visible, before or after the incident.

If the trial court and Eleventh Circuit had followed the guidelines of this Court and from other Circuits, a fact finder would have decided this issue in this case.

As this Court stressed in Howlett, there is a distinction between the vessel's obligation for a pre-turnover defect created in the vessel's structure or appurtenances from those defects created by previous stevedores in the stow. In Howlett, plaintiff alleged that the previously stowed cargo created a defect. The reason for the distinction is that during the voyage, the vessel exercises exclusive control over its

structures and appurtenances and has the obligation and opportunity to inspect prior to turning the vessel over to the stevedore. In particular, this Court stated in Howlett:

> For the purpose of delineating the scope of a shipowner's turnover duty, then, the cargo stow is separate and distinct from other aspects of the ship. When between ports, the vessel and its crew have direct access to (and control over) the ship itself and its gear, equipment and tools. The vessel's responsibilities to inspect these areas of the ship are commensurate with its access and control, bearing in mind, of course, that negligence, rather than unseaworthiness, is the controlling standard where longshoremen are concerned.

512 U.S. _____, 114 S.Ct. 2057, 129 L.Ed. 2d 78, 91 (1994).

Based on this Court's decisions in Howlett and on the Third, Fifth and Ninth Circuit decisions, the trier of fact, not the Court, must resolve the question - whether Respondent owner breached its obligation to turn the work area over to Petitioner Wilson in a reasonably safe condition. Although Petitioner Wilson alleged that the transparent oil constituted a latent defect, there is a factual issue - even if the defect is to be classified as open.

As evidentiary support that the condition was unsafe for a competent stevedore, Petitioner's fellow stevedore, Sam Hughes, and Allsouth's Safety Director, Don Klages, testified that they could not see the transparent oil located directly beneath a bundle of pre-stowed lumber (even after Petitioner had fallen). Thus, if a competent stevedore, like Petitioner, is diligent in checking for the presence of oil created by the vessel owner but cannot see it, this hazard is one for which the owner has potential liability under §905(b), LHWCA. For this reason alone, Petitioner Wilson respectfully requests that this Court, as it did in Howlett, reverse the decision of the Circuit Court and direct that it be remanded to the trial court.

B. UNDER THIS COURT'S DEFINITION, THE UNDETECTABLE, TRANSPARENT OIL CREATED BY THE RESPONDENT OWNER CONSTITUTED A LATENT DEFECT. THUS, BECAUSE THE OWNER FAILED TO WARN PETITIONER WILSON IT HAS POTENTIAL LIABILITY UNDER THE SECOND INDEPENDENT SCINDIA DUTY.

The record before the trial court and the Eleventh Circuit was that Petitioner Wilson and his two colleagues were unaware and could not detect that transparent, undetectable oil was present on the dew covered weatherdeck during their pre-turnover inspection. Although aware that oil was common on vessels, neither Petitioner Wilson nor his colleagues were aware that oil would be or was present on the weatherdeck. In particular, Donald Klages, the Allsouth Safety Director looked specifically at the spot where Petitioner Wilson has fallen. He could not determine the oil until he rubbed his

fingers on it (42a). Moreover, contrary to the erroneous finding of the trial court, Petitioner did not expect to find it on the weatherdeck. (R1-20)(R1-21). The oil had originated, obviously prior to turnover, from the vessel's crane house. He was not warned by the vessel's crew who were present on deck when Petitioner Wilson's co-workers and he boarded (48a). Moreover, the vessel owner offered no evidence that it had, pursuant to Howlett's direction, inspected the area which was under the vessel's exclusive control.

The duty to warn applies to latent defects. As defined by this court in Howlett:

> The duty attaches only to latent defects, defined as hazards that are not known to the stevedore and that would be neither obvious to nor anticipated by a skilled stevedore in the competent performance of his work.

Howlett, 512 U.S. at _____; 114 S.Ct. 2957, 129 L.Ed. 2d 78 (1994) at 4494.

Breaking down the definition of latent defect, one can make the following analysis applicable to this case:

1. Unknown to the stevedore - Neither his colleagues nor Petitioner Wilson were aware of the oil. They could not see it and the vessel who created it did not warn them.

- and -

2. Neither obvious - No one could see the oil even after the fall. In fact, Allsouth's Safety Director had to rub his hands on the spot to detect the oil.

- and -

3. Nor anticipated - In response to Respondent's Motion for Summary Judgment, Petitioner Wilson denied that he anticipated the presence of oil (33a, 36a). In this respect, the trial court's order was based solely on Respondent's Statement of Material Facts to Which There Exists no Genuine Issue to be Tried, a pleading required by the Local Rule, S.D. Ga. Interestingly, the trial court did not refer to Petitioner's response to the Motion for Summary Judgment, nor the affidavit of Petitioner, Sam Hughes (stevedore), Donald Klages (Safety Director) nor the deposition of Donald Klages.

By holding that the duty to warn does not apply if a stevedore is aware generally that oil (not hidden oil) can exist and if the stevedore is diligent enough to check for its presence (which he could not detect), the trial court misapplied this Court's definition of latent defect.

Specifically, the trial court and the Eleventh Circuit failed to recognize that Howlett drew a distinction between pre-turnover defect created by the vessel in its structures/ appurtenances from those defects originating in the previously stowed cargo. Moreover, the trial court and the Eleventh Circuit failed to recognize that the vessel has control over its

gear, equipment and spaces during the voyage. As this Court stated, "the vessel's responsibilities to inspect these areas of the ship are commensurate with its access and control . . ." Howlett v. Birkdale Shipping, 512 U.S. at __, 114 S.Ct. 2057, 129 L.Ed. 2d 78. Having created the danger which emanated from its crane house containing hydraulic lines, the vessel owner had a duty to inspect for oil prior to turning the M/V ALEXANDER'S POWER over to Petitioner Wilson's employer, Allsouth Stevedoring Co. Commensurate with this duty, Respondent vessel owner had an obligation to warn of latent defects, knowledge of which it was charged. Thus, a fact finder, not the court, should resolve this issue.

II. BY REFUSING TO RECOGNIZE THAT RESPONDENT VESSEL OWNER HAS POTENTIAL LIABILITY FOR CREATING AN UNDETECTABLE DEFECT PRIOR TO TURNOVER IN A COMMONLY USED WORK AREA (WEATHERDECK), THE ELEVENTH CIRCUIT AND THE TRIAL COURT HAVE EFFECTIVELY CREATED AN IMPERMISSIBLE ASSUMPTION OF THE RISK DOCTRINE IN THIS §905(B) LHWCA CASE.

Under admiralty law, the doctrine of assumption of risk is not authorized. Socony Oil co. v. Smith, 395 U.S. 424 (1939). However, by holding effectively that Respondent vessel owner had no obligation under either independent Scindia turnover duty for an undetectable defect that it created prior to turnover, the Eleventh Circuit has, for all intents and purposes, held that Petitioner Wilson assumed the risk of slipping on hidden oil on the weatherdeck. Thus, this opinion is absolutely at odds with

the legislative intent to the 1972 LHWCA amendments and with this Court's decisions in Scindia and Howlett. To reiterate, Congress earmarked oil as a hazard for which a vessel owner could be liable in a §905(b) case.

Justifiably, other circuit courts have ruled in favor of shipowners where the stevedore either created the oil hazard during cargo operations or where the Plaintiff was aware of and could have avoided the hazard., e.g., Kirsch v. Prekookeanska Plovidba, 971 F.2d 1026 (3rd Cir. 1992). However, no other court has immunized the vessel owner from liability where, as in this case, there was evidence that the owner created an undetectable oil hazard prior to turnover. Thus, in order to preserve his rights under §905(b) of the Act, Petitioner Wilson respectfully requests that this Court reverse the opinion of the Eleventh Circuit with direction to remand for resolution of both Scindia duties by the jury.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment below.

Respectfully submitted,

Alan S. Gaynor
BOUHAN, WILLIAMS & LEVY
Post Office Box 2139
Savannah, Georgia 31498-1001
(912) 236-2491

ATTORNEYS FOR PETITIONERS

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